No. 83-2098

IN THE

Supreme Court of the United States

October Term, 1984

BENJAMIN H. SASWAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Pursuant to this Court's Rule 22.5, petitioner Benjamin H. Sasway replies to the arguments first raised in the Government's Brief in Opposition (hereinafter "Opp."):

1. **Exclusion of Defense Evidence** (Question 2): The respondent does not deny that the decision of the Ninth Circuit upholding exclusion of petitioner's proferred testimony in his own defense is in conflict with this Court's decision in *Crawford v. United States*, 212 U.S. 183 (1909). Indeed, the respondent does not even mention *Crawford*. *See* Opp. 8-9. Nor does the respondent seriously argue that the decision below does not conflict with the Fourth Circuit's decision in *United States v. Bowen*, 421 F.2d 193, 197 (1970).[1] Finally, the respondent does not even suggest that petitioner's Question 2 is not substantial or important. Instead, without even attempting to defend the self-contradictory holding of the court below that the District Court had "discretion" to exclude petitioner's testimony because it was "irrelevant,"[2] the respondent argues that the trial court's action was correct. This is not a persuasive reason to deny certiorari.

Most of the cases cited by respondent do not support its position. In *United States v. Smogor*, 411 F.2d 501, 504 (7th Cir.), *cert. denied*, 396 U.S. 972 (1969) the court acknowledged that it "fail[ed] to comprehend the defendant's argument." In others, the issue was the extent to which a good faith belief in the unconstitutionality of conscription may constitute a negation of wilfullness, which is quite different from the issue in this case. *United States v. Boardman*, 419 F.2d 110, 114-16 (1st Cir. 1969), *cert. denied*, 397 U.S. 991 (1970); *Harris v. United States*, 412 F.2d 384, 388-90 (9th Cir. 1969); *United States v. More*, 436 F.2d 938, 940 (9th Cir. 1971) (per curiam); *United States v. Day*, 442 F.2d 1034

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[1] In a footnote (Opp. 9, n. 5), respondent states that *Bowen* "is not to the contrary," but can point to nothing distinguishing that case from this one. The statutory violation charged in the two cases was identical (50 U.S.C. App. Section 462(a), clauses 4 and 6) and hence the mental element involved in each was the same. Moreover, in each the defendant was permitted to testify a little, but not to explain his reasons. As recognized in *United States v. Irwin*, 546 F.2d 1048, 1051 n. 7 (3d Cir. 1976), relied on by respondent, *Bowen* is simply inconsistent with the view of the court below.

[2] If the testimony was actually "irrelevant," exclusion was mandatory, not discretionary. Fed. R. Evid. 402. Compare *id.* 403. As we showed in the petition, however, and further explicate below, the excluded evidence, while not conclusive, was surely relevant and helpful to the defense.

(9th Cir. 1971) (per curiam).[3] Only *Irwin*, note 1, *supra*, actually supports the decision below, and it conflicts with *Bowen, supra*, which supports petitioner. In short, there is a conflict in the circuits (and with this Court's precedent) warranting certiorari.

Moreover, it is the respondent's position, not petitioner's, which "confuses" (Opp. 8) basic principles of criminal law and evidence. Respondent seems to suggest that because good motive is not a defense, as such, *evidence* of motive is entirely irrelevant. This is plainly wrong, as would be the equivalent argument by a defendant that simply because the existence of a motive to commit a crime does not itself move guilt, it follows that evidence of such motive is irrelevant to the issues of identity or intent. The distinction--that evidence need not be conclusive to be relevant--is recognized in the standard jury instruction explaining the relationship of motive and intent. 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* 14.11, at 395 (3d ed. 1977); *United States v. Pomponio*, 429 U.S. 10, 11 (1976) (per curiam) ("'Good motive alone is never a defense . . .' [C]onsequently motive [is] irrelevant except as it [bears] on intent.").

In a Selective Service case, as the Fourth Circuit recognized in *Bowen*, a defendant's evidence of motive does bear on the intent element. *Accord, Ex parte Stewart*, 47 F.Supp. 415, 417 (C.D. Cal. 1942). As respondent recognizes, the *mens rea* of these offenses is a strict requirement of specific intent to violate the law, coupled with actual knowledge of one's legal obligations. The respondent contends that "*Once that has been established*," the defendant's reasons are "simply irrelevant." Opp. 8. This fails to recognize that nothing is established in a criminal case until the jury renders its verdict. The weight of the prosecution's case can hardly determine the admissibility of defensive proof. Where purpose is thus made substantively relevant, evidence of motive--while not conclusive--must be admissible.

In this case, the government recognized the relevance of the defendant's reasons by offering selected statements by him--including a television interview--during its case in chief. It then succeeded in

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[3] The *Harris* and *Boardman* courts also upheld exclusion of defense evidence of good character--rulings now of questionable validity under Fed. R. Evid. 404(a)(1)--and exclusion of defense evidence supporting the reasonableness (as contrasted with the motivating force or genuineness) of the defendant's beliefs. Neither kind of evidence is at issue here.

slamming shut the door it had opened when the time came for defendant to offer an explanation. This is neither fair nor lawful.

In short, no reason for denying the writ on Question 2 has been offered, and the petition should be granted.

2. **Continuing Offense** (Question 3): As was the case with Question 2, the respondent offers no real reason to deny the writ on this question, which divided the Eighth Circuit, five to four, and which this Court recognized as sufficiently important to warrant review by deciding *Toussie v. United States*, 397 U.S. 112 (1970). Nor (as with Question 2) does the respondent even attempt to defend the decision below on the ground on which the Ninth Circuit rested it, no doubt recognizing that court's patent violation of the rule announced in *Chiarella v. United States*, 445 U.S. 222, 237 n. 21 (1980). See Petition 12-13. Instead, the respondent simply incorporates by reference its opposition to review in the Eighth Circuit case, *United States v. Eklund*, 733 F.2d 1287 (1984) (en banc), *cert. pending*, No. 83-1959.

The new points made in the *Eklund* opposition and adopted by respondent in this case may be briefly answered. The majority decision in *Toussie* necessarily rested upon a recognition that the violation of a continuing duty does not necessarily constitute a continuing offense. Petitioner here (unlike petitioner Eklund) has not denied that Congress, in enacting 50 U.S.C. Section 462(d), did intend to establish a kind of continuing *duty* to register. Nevertheless, Congress did not attempt to satisfy the criteria enunciated by the Court in *Toussie* for the establishment of a continuing offense. The continuing offense doctrine has impact on at least three issues: contemporeneity of an act and intent (as here), statute of limitations (as in *Toussie*) and venue. *Toussie* recognized that a statutory provision dealing with one of these issues does not necessarily affect the others. 397 U.S. at 120-21 n. 16 (discussing venue cases). Likewise here, where Congress responded to the *Toussie* decision by writing a special, extended statute of limitations, it did not thereby create a continuing offense for all purposes.[4]

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[4] That some members of Congress, including some sponsors of the amendment, did not clearly understand this Court's *Toussie* decision and so erroneously identified a continuing duty with an automatic continuing offense cannot change this result. *See Eklund* Opp. 13-14.

Petitioner has argued that respondent's proposed construction of the statute raises a serious Fifth Amendment problem which the construction proposed by petitioner avoids.

By adopting its *Eklund* response rather than actually addressing petitioner's arguments in this case, the respondent answers our Fifth Amendment contention only obliquely. To the extent it does, however, it misses the mark.[5] "First," respondent claims, "in no case has a late registrant been prosecuted for his previous failure to register." *Eklund* Opp. 17. Alas, this is untrue. *See, e.g. United States v. Boucher*, 509 F.2d 991 (8th Cir. 1975); *United States v. Klotz*, 500 F.2d 580 (8th Cir. 1974); *Kaohelaulii v. United States*, 289 F.2d 495 (9th Cir. 1968). Likewise, it is reassuring to read that "a nonregistrant may be punished only once for failing to register regardless of whether that offense is a continuing one." *Eklund* Opp. 10 n. 11; *see also id.* 17. Nevertheless, the government cites no authority for this claim. An August 25, 1982 letter from David J. Kline, the Justice Department official "responsible for supervising enforcement of the Selective Service laws" (Brief for U.S., *Wayte v. United States*, No. 83-1292, at 4) takes the opposite position. (See Appendix to this reply).[6]

A continuing duty to register late, once the Proclamation period has ended, is undeniably compulsion. It is a legislative command of the sovereign. To contend that an obligation to register after expiration of the six-day Proclamation period (60 days since 1981) is no *further* "compulsion" than existed during that period is no answer. See *Eklund* Opp. 17-18. Only compulsion to self-incriminate is relevant under the constitutional privileges. The legal obligation to register which existed during the prescribed period is not Fifth Amendment "compulsion" at all. *Cf. South Dakota v. Neville*, 459 U.S. 553, 562-64 (1983). After that period expires, the privilege comes into play for the first time, much as it revives upon expiration of a grant of immunity (under which there is compulsion, but not to self-incriminate). See *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983). The district court's construction of this criminal

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[5] In *Eklund*, the petitioner argues that the statute is unconstitutional in violation of the Fifth Amendment. In this case, petitioner argues that the respondent's proposed construction of the statute would create a Fifth Amendment problem, while petitioner's construction would avoid it. Accordingly, by merely adopting its *Eklund* response, respondent has not answered petitioner's argument.

[6] This letter, which is included in the appendix, was released by the government to the defense in *United States v. Kerley*, No. 82-CR-47-D (W.D. Wis.)

statute, as defended by respondent, should be rejected because it leads unnecessarily to this difficult constitutional problem. *Cf. United States v. Jennings*, 603 F.2d 650 (7th Cir. 1979); *United States v. King*, 402 F.2d 694 (9th Cir. 1968) (misprision of felony, 18 U.S.C. Section 4, held inapplicable on Fifth Amendment grounds to persons concealing and failing to report their own crimes).

Nothing in *Selective Service System v. MPIRG*, 104 S.Ct. 3348 (No. 83-276, decided July 5, 1984), is contrary. The part of the statute there involved, 50 U.S.C. App. Section 462(f), did not purport to impose any obligation of late registration, only an opportunity to qualify for certain benefits in exchange for doing so. Hence, it did not *compel* self-incrimination. 104 S.Ct. at 3358.[7] Implicitly, *SSS v. MPIRG* acknowledges the seriousness of the self-incrimination problem posed by the government's "continuing offense" theory. For the very act of late registration "necessarily admit[s]," *id.* at 3359 n. 16, prior nonregistration, which is a crime, and provides admissions of two of that crime's elements, sex and age.

CONCLUSION

For the above reasons, as well as for those stated in the Petition, certiorari should be granted.

DATED: October 8, 1984

Respectfully submitted,

CHARLES T. BUMER
PETER GOLDBERGER
CAROL L. DELTON
MICHAEL J. VEILUVA
JONATHAN M. SOFFER

Attorneys for Petitioner

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[7] Petitioner here does not share the *SSS v. MPIRG* respondent's ripeness and standing problems arising from their failure to attempt late registration while seeking immunity or claiming the privilege. 104 S.Ct. at 3358-59. Petitioner raises the Fifth Amendment point only as an argument in favor of strict construction of the statute under which he is being prosecuted.

APPENDIX

LL:DJK:skb
TYPED: 8-22-82
Honorable Gerald D. Fines
United States Attorney
Central District of Illinois
Post Office Box 375
Springfield, Illinois 62705

Attention: Charlene A. Quigley
Assistant U.S. Attorney

Re: Selective Service
Non-Registrant Prosecutions

Dear Mr. Fines:

By letter dated August 13, 1982, you enclosed a copy of a letter you proposed sending to non-registrants in your district. You also raised two questions. First, you inquired about venue in cases in which college students have permanent residences outside the district in which they attend college. Second, you asked whether a person who refuses to register after conviction can be prosecuted a second time.

I. VENUE

[Paragraph deleted by Department of Justice prior to release of document.]

Since there may exist a choice of districts in which prosecutions may be brought, we prefer that cases be brought in the districts which would be most convenient for the defendants, assuming that such prosecutions would not create proof problems. Your district would seem to be the more convenient place for the prosecution of a defendant who would, at the time of indictment, be attending school there.

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[1] The court in *United States v. Sasway*, Criminal Case No. 82-05004-GT (S.D. Cal.), found on August 18, 1982, that the failure to register was a continuing offense.

[2] Presidential Proclamation 4771, set out as a note to 50 U.S.C.A. App. § 453.

[3] 50 U.S.C. App. § 462(d).

[4] Presidential Proclamation 4771, § 1-201.

II. CONTINUING OFFENSE

You also asked the following questions:

> Can a person be prosecuted for continued refusal to register? If not, is he then immune from prosecution for non-induction?

You then stated that, "If there is a legal immunity, it would seem that for many [,] $10,000 or a short jail stay is a small price to pay to avoid military service."

No mandatory induction into the military presently exists. Consequently, even if the failure to register were not a continuing offense, accepting a prosecution and penalty for non-registration could not be equated with avoiding military service.

Nonetheless, in our view the failure to register is a continuing offense. Consequently, a person could be prosecuted a second time if he continued to refuse to register.[5]

[Paragraph deleted by Department of Justice prior to release of document.]

III. CONCLUSION

We hope that this letter has been of some assistance to you. We enclose a copy of a memorandum which deals with both venue and the continuing nature of violations under 50 U.S.C. App. § 462.

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[5] The offense discontinues at age 26. See 50 U.S.C. App. § 462(d).

Please feel free to call us at FTS 724-7144 if you have any questions or if we may be of further assistance.

Sincerely,

LAWRENCE LIPPE, Chief
General Litigation and
Legal Advice Section
Criminal Division

BY:

DAVID J. KLINE
Attorney

Enclosure